

6 Official Opinions of the Compliance Board 140 (2009)

Public Body – Determined not to be a meeting – Subcommittees of the Maryland Bicycle and Pedestrian Advisory Committee created by informal consensus

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The Open Meetings Compliance Board has considered your complaint that the Maryland Bicycle and Pedestrian Advisory Committee (“MBPAC”) has violated the Open Meetings Act by failing to provide notice in advance of a meeting and failure to provide minutes of subcommittee meetings. Based on the response to the complaint, the gravamen of the complaint actually involved a meeting of a MBPAC subcommittee. For the reasons explained below, we find that no violation occurred in that the subcommittees are not subject to the Open Meetings Act. While the record is insufficient for us to rule on the lag time in MBPAC producing minutes following past meetings, the action proposed by MBPAC should ensure that in the future information following MBPAC meetings is available to the public earlier.

I

Complaint and Response; Supplemental Record

According to the complaint, MBPAC has recently conducted a meeting at which the State’s shoulder striping policy was considered without providing notice of the meeting to the public as required by the Open Meetings Act. The complaint further alleged that MBPAC subcommittees routinely conduct meetings that are not open to the public. Furthermore, according to the complaint, minutes of the subcommittee meetings are not made public. While the complaint commented positively on the fact that MBPAC now posts its minutes online, the timeliness of the postings was questioned, noting that the minutes of the last two meetings are not yet available.

In a timely response on behalf of MBPAC, Michael E. Jackson, Director of Bicycle and Pedestrian Access at the Maryland Department of Transportation (“MDOT”), indicated that the meeting concerning highway shoulder striping referenced in the complaint was a meeting of MBPAC’s

Commuting and Transportation Subcommittee held on January 21, 2009. The response acknowledged that public notice was not provided in accordance with the Open Meetings Act. The response also acknowledged that minutes were not prepared.

The response indicated that, based on a review of its procedures, requirements of the Open Meetings Act, and discussions with its legal counsel, the following actions would be taken to ensure future compliance with the Act's requirements: notice of MBPAC subcommittee meetings will be added to the listing of committee meetings posted on the MBPAC's section of MDoT's website and, if sufficient time is available, included in the *Maryland Register*; minutes of subcommittee meetings will be produced and posted on MDoT's website; and draft copies of the minutes of MBPAC meetings will be posted on MDoT's website prior to formal approval to ensure that the public can learn what transpired in a more timely fashion.¹

Based on our review of the record and independent research, we felt additional information was required before we could fairly evaluate the application of the Act to MBPAC's subcommittees. Thus, we asked Mr. Jackson to clarify how the subcommittees were established. Mr. Jackson explained that, in April 2001, a MBPAC workshop was held with the assistance of a facilitator. Participants were divided into smaller groups which were asked to develop a subcommittee structure for MBPAC. The consensus was that there be four subcommittees. At the next MBPAC meeting, May 15, 2002, members voted by a show of hands to reaffirm the April 2001 decision to form four subcommittees. The four subcommittees are: Recreation and Tourism, Commuting/Transportation, Safety/Health/Education, and Legislative/Government Affairs.

¹ The complaint also addressed the failure to make agendas available in advance of meetings. While many public bodies have adopted the practice of making agendas publicly available in advance of meetings as a service to the public, it is not required by the Open Meetings Act. *See 4 OMCB Opinions* 168, 172 (2005). Thus, in submitting the complaint to the MBPAC for response to the complaint, we noted that the response need not address this issue. Similarly, the complaint suggested that a visitor whose comments are reflected in the minutes of a meeting ought to be given an opportunity to comment on the draft before approval; however, this issue is not addressed by the Open Meetings Act.

II

Analysis

A. Application of Act

In considering the application of the Open Meetings Act, three questions must be asked: (1) Is the entity a “public body” as that term is defined by the Act? (2) If so, did the particular gathering constitute a “meeting” for purposes of the Act? (3) Finally, was the topic of discussion subject to the Act? If the answer to any of these questions is no, the analysis ends, because neither the substantive nor the procedural requirements of the Open Meetings Act apply. *See, e.g., 5 OMCB Opinions* 194, 196 (2007).

The Act sets forth two alternative paths by which a group might constitute a “public body.” Section 10-502(h)² defines “public body,” in relevant part, as:

(1) ... an entity that:

(i) consists of at least 2 individuals; and

(ii) is created by:

1. the Maryland Constitution
2. a State statute;
3. a county or municipal charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision.

(2) “Public body” includes:

- (1) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the

² Unless otherwise noted, statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or the political subdivision.

An entity is a “public body” if it meets the criteria of either paragraph (1) or (2) of §10-502(h). Conversely, if it does not meet the criteria under either paragraph, it is not a “public body” and therefore, not subject to the Act. 5 *OMCB Opinions* at 197.

It is clear that the MBPAC is a public body. It was established pursuant to legislation and its membership is described by statute. Transportation Article, §2-606, Annotated Code of Maryland. However, the four subcommittees were not created by any formal mechanism identified in paragraph (1). Nor do the subcommittees fit the definition of a public body under paragraph (2). Rather, the subcommittees were simply created by the MBPAC by informal consensus.

B. MBPAC – Minutes

The only allegation pertaining to MBPAC was a general allegation about the timeliness of its minutes. The Act requires that minutes be prepared “[a]s soon as practicable,” §10-509(b). Based on the limited record before us, we are unable to evaluate whether the time lag for producing minutes of MBPAC meetings was unreasonable. However, MBPAC’s proposal to make draft copies available online before formal approval appears to address the concern about timeliness of information available to the public following a MBPAC meeting and goes beyond the requirements of the Act.³

C. Commuting and Transportation Subcommittee

The response acknowledged that the MBPAC Commuting and Transportation Subcommittee met on January 21, 2009, without giving public notice, and without producing minutes. However, given that the subcommittee is not a “public body,” no violation of the Act occurred. Although not required by law, we commend MBPAC for its willingness to alter its practices so that its subcommittees would operate in accordance with the Act.

³ Although numerous public bodies post minutes of the meetings online and it is a practice that we commend, nothing in the Open Meetings Act actually requires that a public body post its minutes on a website.

III

Conclusion

In summary, we find that the meeting of the MBPAC Commuting and Transportation Subcommittee held on January 21, 2009, did not violate the Open Meetings Act because the Act does not apply to MBPAC subcommittee meetings. Based on the limited record before us, we are unable to rule on whether the lag time for producing minutes of MBPAC meetings was unreasonable. However, MBPAC's proposed action will ensure that in the future information about MBPAC meetings is available to the public earlier.

OPEN MEETINGS COMPLIANCE BOARD

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